Supreme Court, U.S.
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No.

# IN THE
# SUPREME COURT OF THE UNITED STATES
## OCTOBER TERM 1997

WILTON E. HEYLIGER,

*Petitioner,*

v.

STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF TENNESSEE, ALLEN SPRITZER, and JON SMITH,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Full Faith and Credit Act requires an aggrieved individual with both a state and federal anti-discrimination claim to bypass the administrative procedure of investigation and conciliation by the EEOC and join the federal anti-discrimination claim with the state anti-discrimination claim in a state court.

2. Whether the court of appeals erred by rejecting a federal anti-discrimination claim against a state university for retaliatory discharge on the ground of a prior summary judgment by a state court which ruled state law did not prevent retaliation by the university.

## PARTIES TO THE PROCEEDING

Wilton E. Heyliger, plaintiff and plaintiff-appellant below, is an individual who formerly resided in Washington County, Tennessee and presently resides in Fulton County, Georgia. Wilton E. Heyliger was formerly employed by the State University and Community College System of Tennessee, defendant and defendant-appellee below, and which operates East Tennessee State University located in Washington County, Tennessee. Allen Spritzer, defendant and defendant-appellee below, is the dean of the college of business and economics at the university, and Jon Smith, defendant and defendant-appellee below, is chairperson of the department of economics at the university. Both Spritzer and Smith are residents of Washington County, Tennessee.

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## CITATION TO REPORT OF OPINION

The order and memorandum of the district court are unreported, and the citation of the decision by the court of appeals as to which the writ is requested is:

Wilton E. Heyliger v. State University and Community College System of Tennessee, Allen Spritzer and Jon Smith, 6th Circuit Court of Appeals, No. 96-5307, 126 F.3d 849, 1997, Fed. App. 02976P (6th Cir.).

## JURISDICTION

The judgment of the Court of Appeals was entered October 3, 1997. The statutory provision believed to confer jurisdiction to review on writ of certiorari is 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

The faculty contract of Wilton E. Heyliger at a university operated by the State of Tennessee was not renewed because he protested faculty recruiting practices that discriminated against applicants by reason of race, age, and national origin. Notice of the nonrenewal followed shortly after Dr. Heyliger's department chairperson was selected via the discriminatory practice. (App. B at A-17-25.)

Dr. Heyliger was the only black faculty member in the college of business and economics, having been recruited under the decree in Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), aff'd 801 F.2d 799 (6th Cir. 1986). His protest about discriminatory recruiting for the department chairperson was rebuffed by assertions the university did not need any more minorities and it is not possible to put into print the vehement reaction of the dean and newly selected

chairperson after Heyliger protested. Almost immediately, the chairperson refused to speak to Dr. Heyliger in the presence of students or faculty and also solicited graduate students to report problems. No white faculty member was treated in this way. The chairperson told Dr. Heyliger he would be treated exactly the same as white faculty members despite requirements to the contrary in the Geier decree. Both the chairperson and dean publicly stated that as a black male, all Dr. Heyliger wanted to do was "bullshit" his way to success; they publicly called him a "liar" and "asshole." No white faculty member was called these names. The chairperson also solicited an allegation of plagiarism from an outside source. The allegation was never investigated, considered or sustained under policies of the university which required formal notice and a hearing on an allegation of plagiarism. (App. B at A-17-25.)

In September 1990 Dr. Heyliger filed an EEOC complaint alleging the nonrenewal was in retaliation for his criticism of the recruiting practices, and in December 1990 Dr. Heyliger filed a complaint in a Tennessee chancery court alleging retaliation in violation of Tennessee's anti-discrimination act. In November 1993 the chancery court dismissed for lack of subject matter jurisdiction, ruling that Tennessee's anti-discrimination act did not prevent retaliation. (App. C at A-27-29.) While an appeal of the dismissal was pending, the EEOC issued a notice of right-to-sue and Dr. Heyliger filed a complaint in federal district court alleging retaliation in violation of Title VII. During pendency of the action in federal district court, a state court of appeals in July 1994 affirmed dismissal by the chancery court through a reiteration that Tennessee's anti-discrimination act did not prevent retaliation and also on the different ground the university enjoyed sovereign immunity and Tennessee's anti-discrimination act was not a waiver of the immunity for retaliation claims, the latter ground having been based upon definitional distinctions in the act. (App. D at A34-35.) The

Tennessee supreme court in January 1995 denied permission to appeal in an order entitled "Concurring in Results Only."[1] (App. E at A37.)

**The Proceeding Below**

The federal district court subsequently dismissed Dr. Heyliger's Title VII action in February 1996 under the Full Faith and Credit Act, 28 U.S.C. § 1738, on the basis of res judicata and collateral estoppel. The federal court of appeals called the state court decision "an obviously erroneous judgment" but affirmed the district court "[f]or reasons somewhat different from those relied on below. . .". (App. A at A2, 8.)

The new reasons, not advanced by the parties or considered by the district court, consisted of an assumption Dr. Heyliger could have merged his Title VII claim with the chancery court action through demanding a notice of right-to-sue from the EEOC, and then amending the chancery court pleadings for the purpose of making a Title VII claim. Based on these assumptions, the court of appeals held Dr. Heyliger reasonably could have litigated his Title VII claim in chancery court, with a result that the doctrine of claim preclusion through the Full Faith and Credit Act would prevent relitigation of the Title VII claim in the district court. (App. A at A14-16.)

Because the issue of mandatory abandonment was raised *sua sponte* on appeal, Dr. Heyliger did not have an opportunity to demonstrate the reasons he preferred EEOC investigation and conciliation. Those reasons included a purge of other black faculty at the university, with two other

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[1] According to a chief justice of the court, by this unique practice the underlying opinion is "consigned to oblivion" and leaves everyone "in a position of having to speculate as to our reasons." Pairamore v. Pairamore, 547 S.W.2d 545, 552 (Tenn. 1977).

faculty members having filed administrative or judicial claims, an ongoing inquiry by the local NAACP, and an investigation by the Department of Justice about possible violations of the Geier decree.

## ARGUMENT

If allowed to stand, the application of claim preclusion or res judicata by the court of appeals will have the effect of coercing charging parties in many federal anti-discrimination procedures subject to investigation and conciliation by the EEOC to prematurely abandon the administrative system created by Congress to resolve discrimination complaints. Others may be required to forego the procedures. Aggrieved individuals who have a state law claim arising from the same setting as their federal discrimination claim will be required to bypass the EEOC and ventilate the federal discrimination claim in a state court where the related state claim is pending. Some aggrieved individuals with other claims subject to a relatively short statute of limitations will have to forego their federal anti-discrimination claim in order to file a timely civil action encompassing the other claims.

When Title VII was enacted, Congress intended that as many claims as possible be resolved by filing an initial complaint with the EEOC followed by investigation and conciliation by the EEOC. Voluntary compliance is to be the "preferred means" for achieving Title VII's purpose of eradicating employment discrimination based on race, sex, national origin, or religion. Alexander v. Gardner-Denver Company, 415 U.S. 36, 44 (1974). "To this end, Congress . . . established a procedure whereby existing state and local employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the agreed party was permitted to file a lawsuit." Ibid.

The instant decision substantially thwarts the preferred

means established by Congress to resolve federal discrimination claims. Title VII's legislative history reflects a strong Congressional preference for letting the administrative process run its course so that as many claims as possible may be resolved by informal methods of conciliation and persuasion. The Conference Report on the 1972 amendments to Title VII stated, "It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC." 18 Cong. Rec. 7168 (1972). The instant decision will substantially thwart the hope by superimposing artifical constraints on the process, although substantial resources are devoted to the process.

The EEOC employs approximately 3,000 persons at about 50 field offices and its Washington, D.C. headquarters. EEOC Order 110 (July 1, 1994), reprinted in 1 EEOC Compl. Man. (BNA) 110; 0101 and :0201. The primary focus of this workforce is to handle charges from intake through resolution, and the process was significantly changed in 1995 to streamline the procedures. News and Background, EEOC Adopts Charge-Priority System, 149 LRR 13 (May 1, 1995). The administrative process vested in the EEOC has been described as "elaborate" and was designed "to assist in the investigation of claims of racial discrimination in the work place and to work toward resolution of those claims through conciliation rather than litigation." Patterson v. McLean Credit Union, 491 U.S. 164, 180-81 (1989).

Application of claim preclusion or res judicata in a manner that effectively forces individuals to either accelerate or forego the full EEOC administrative process of investigation, determination and conciliation is inconsistent with the stated congressional objective and the establishment of a 3000-person workforce in 50 offices. The new constraints will cause many individuals to short circuit the administrative process. This Court has previously criticized

action by a plaintiff which would "completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII." Great American Fed. S&L Ass'n v. Novotny, 442 U.S. 366, 376 (1979). The instant decision will require frequent bypasses for many aggrieved individuals who wish to timely pursue another claim related to the federal anti-discrimination claim without taking a chance about whether pleadings can be amended at a future date.

Under Title VII and other federal anti-discrimination laws, persons aggrieved by employment discrimination may not bring suit until they obtain a right-to-sue notice from the EEOC. An aggrieved individual is not required to wait until the termination of the what can sometimes be a lengthy investigation and conciliation process, as 42 U.S.C. § 2000e-5(f)(1) permits a charging party to request a right-to-sue notice for the purpose of filing a judicial action even if the administrative processes have not been completed, so long as the EEOC has processed the charge for at least 180 days. After 180 days, "[i]f a complainant is dissatisfied with the progress the EEOC is making on his or her charge of employment discrimination, he or she may elect to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court." Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 361 (1977).

Prior to the instant decision, an election to proceed with EEOC investigation and conciliation after 180 days was possible. Congress also made it possible for charging parties to shortcut the administrative processes after 180 days, but did not make it mandatory for this to occur. "After waiting for that period, the complainant may either file a private action within 90 days after EEOC notification or continue to leave the ultimate resolution of his charge to the efforts of the EEOC." Occidental Life Insurance Co., supra, at 361. The decision by the court of appeals charts a different and possibly accelerated course for those who file charges with

the EEOC.

The requirement articulated by the court of appeals will be mandatory even if an aggrieved individual has a valid and substantial basis for filing with the EEOC, allowing the EEOC investigation to continue, and wishes to attempt conciliation through the EEOC. The decision will have the effect of eliminating any real possibility of informal resolution when a charging party also has a state law or other claim which may be subject to a short limitations period. The decision presents an almost impossible requirement for aggrieved individuals who wish to timely assert a state law or other legal claim subject to a short statute of limitations. Under 42 U.S.C. § 2000e-5(f)(1), the individual may be required to wait 180 days to demand a notice of right to sue. The decision by the court of appeals requires the individual to promptly make the demand, while in some instances it will have been necessary to file a civil action about the same date the demand can be made.[2] Given the nearly impossible requirement of waiting 180 days to request and immediately receive a notice of right to sue, the aggrieved individual can only hope that the state or federal judiciary will always allow amendment of any pending civil action so the federal anti-discrimination claim may be joined after receipt of the notice of right-to-sue. Although amendments may be allowed, there is no guarantee and valuable rights may be lost.

The far-reaching and extreme result required under the instant decision is vividly demonstrated by considering Dr. Heyliger's plight. Here, although he had no possible claim under the Tennessee anti-discrimination law (according to the state courts), he has been penalized for not bypassing the EEOC and attempting to amend the chancery court action for

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[2] For example, an employment related claim subject to the six-month limitation required under Del Costello v. Teamsters, 462 U.S. 151 (1983).

the purpose of combining the Title VII claim with a non-existent claim in chancery court.

The rule established by the court of appeals will deprive many aggrieved individuals of any benefit from the EEOC coniliation procedure. Individuals may never learn information the EEOC might have uncovered had its investigation continued such information that might influence either the aggrieved individual's decision about whether to file a private action, or the respondent's decision regarding a conciliated settlement.

Under this decision, an aggrieved individual will lose the potential evidentiary value of an EEOC finding of reasonable cause; a finding which while not binding is regularly admitted as evidence in Title VII actions. Smith v. Universal Services, Inc., 454 F.2d 154, 157-58 (5th Cir. 1972). Plumber v. Western Int'l. Hotels Co., Inc., 656 F.2d 502, 505 (9th Cir. 1991).

The decision will also interfere with the EEOC's mission of enforcing federal anti-discrimination laws in the public interest, as some meritorious cases on which the EEOC may initiate litigation will be withdrawn without investigation or never lodged with the EEOC due to time constraints.

## CONCLUSION

In summary, it was error for the court of appeals to apply res judicata under the Full Faith and Credit Act by sua sponte raising an issue on appeal—perhaps due to an unwarranted fascination with the more modern concept of claim preclusion. But in the final analysis, Dr. Heyliger could not know in advance the erroneous judgment of the chancery court would be affirmed until exhaustion of the state appellate procedure, a procedure which was underway when the EEOC issued a notice of right-to-sue over which the state

appellate court had no jurisdiction.[3] Similarly, Dr. Heyliger could not know in advance the court of appeals would sua sponte create a new rule of claim preclusion by holding he should have bypassed investigation and conciliation by the EEOC, and that he should have known the chancery court would have definitely allowed a combination of his federal claim with a state law claim over which all of the state courts consistently ruled there was no subject matter jurisdiction.

This case presents indicia of racial animosity by the university that cannot be fully described and also presents a new rule about res judicata or claim preclusion which will have the effect of coercing many persons with a federal anti-discrimination claim to either short circuit or bypass the EEOC. The new rule is at odds with the entire federal anti-discrimination administrative scheme of encouraging conciliation short of litigation, and will have an effect far beyond the egregious result visited upon Dr. Heyliger.

Accordingly, Dr. Heyliger requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

/s/_____

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[3] We do not understand Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820 (1990) to suggest that state appellate courts will adjudicate Title VII claims.

# APPENDIX

## APPENDIX A

**No. 96-5307**

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| Wilton E. Heyliger,<br>*Plaintiff-Appellant,*<br><br>v.<br><br>State University and Community College System of Tennessee, Allen Spritzer, and Jon Smith,<br>*Defendants-Appellees.* | ) | On appeal from the United States District Court for the Middle District of Tennessee at Nashville |

**Decided and Filed: October 3, 1997**

**Before: MERRITT, KRUPANSKY, and BOGGS, Circuit Judges**

### OPINION

BOGGS, Circuit Judge. Wilton E. Heyliger appeals the district court's dismissal, as "res judicata," of his complaint alleging employment discrimination in violation of

Title VII, 42 U.S.C. ¶ 2000e *et seq.* For reasons somewhat different from those relied on below, we find that Heyliger's Title VII claim was barred by the doctrine of claim preclusion, and thus affirm the judgment of the district court.

I

According to his affidavit, Heyliger, a black male, is a native of the former British Guiana who immigrated to the United States in 1967, attended Howard University, obtained a doctorate in economics from Indiana University, and became an American citizen in 1986. In 1988, East Tennessee State University ("ETSU"), a unit of defendant State University and Community College System of Tennessee, recruited Heyliger to join ETSU's Economics and Finance faculty as an associate professor, a tenure-track position. Apart from his teaching duties, Heyliger served on two faculty committees, one pertaining to race relations on campus, the other a search committee for a new chair of his department. Heyliger expressed the view that the search procedures and job qualifications adopted by the committee discriminated against applicants by reason of their race, age, and national origin. Consequently, he claimed, the committee rejected a highly-qualified candidate who was a native of India. Heyliger then protested the eventual selection of defendant Jon Smith, a former member of the search committee, who, Heyliger claimed, did not meet the committee's own criteria. Smith -- Heyliger's new boss -soon recommended that Heyliger's contract not be renewed at the end of the 1990-91 academic year. Smith justified his recommendation by stating that Heyliger was incompetent, had sexually harassed a number of female students, and had

committed plagiarism, charges which Heyliger denied. Defendant Allen Spritzer, dean of the College of Business, adopted Smith's recommendation. Heyliger was informed in May 1990 that his contract would not be renewed upon its expiration in July 1991.

Heyliger filed a complaint with the EEOC in September 1990, alleging violations of Title VII. On December 5, 1990, he filed a complaint in state court, alleging violations of the Tennessee Human Rights Act, T.C.A. § 4-21-101 *et seq.* Almost three years later, on November 19, 1993, the chancery court granted the defendants' motion for summary judgment. On July 27, 1994, the Tennessee court of appeals affirmed that decision. On January 30, 1995, the Tennessee Supreme Court denied permission to appeal in a brief order headed "Concurring in Results Only."

Meanwhile, on January 12, 1994, some two months after Heyliger's loss in chancery court, Heyliger received from the EEOC a notice of right to sue. Heyliger filed a complaint in federal district court on April 13, 1994, seeking, among other things, actual and punitive damages, and either reinstatement to his position or front pay. The court referred the case to a magistrate judge, who issued a report and recommendation on September 20, 1995, recommending that the defendants' motion to dismiss or for summary judgment be granted on res judicata or collateral estoppel grounds. Heyliger filed objections. The district court adopted the report and recommendation, and dismissed the case on February 8, 1996. Heyliger timely appealed.

II

This court reviews de novo a district court's decision with regard to issue preclusion (collateral estoppel) or claim preclusion (res judicata in its narrow sense). *See Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994). When considering whether the judgment of a state court will have either type of preclusive effect on a subsequent action brought in federal court, the Full Faith and Credit Act, 28 U.S.C. § 1738, requires the federal court to give the prior adjudication the same preclusive effect it would have under the law of the state whose court issued the judgment. *See Migra v. Warren City School Dist.*, 465 U.S. 75, 81 *(1984);Allen v. McCurry,* 449 U.S. 90, 96 (1980). This requirement does not apply, however, where the statute creating the federal cause of action eliminates, for such claims, the strictures of the Full Faith and Credit Act. In the language of the cases, the statute must contain "an express or implied partial repeal" of § 1738. *Matsushita Elec. Indus. Co. Ltd. v. Epstein,* 116 S.Ct. 873, 881 (1996); *Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 386 (1985). The Supreme Court held in *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461,470-72 (1982), that Title VII contains no such repeal. Consequently, Heyliger's federal suit is subject to whatever preclusive effect the state court judgments would have under Tennessee law.

Before beginning that analysis, it might be useful, in view of the perennial confusion over the vocabulary and concepts of the law of preclusion, to restate the following exposition:

The Supreme Court has noted:

> [t]he preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar.

*Migra v. Warren City School Dist. Bd of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984) (citations omitted). Some commentators and court decisions have used the term "res judicata" as being "virtually synonymous with 'claim preclusion.'" *Ibid.*

> In the proceedings attendant to these appeals, the parties and the district court appear to have adopted the position that "res judicata" is synonymous with "claim preclusion" and "collateral estoppel" is synonymous with "issue preclusion." At this stage of the litigation, we will not disturb this usage although we will, during the course of our discussion of the legal issues, use the terms "claim preclusion" and "issue preclusion." We also express our hope that future litigants, in the interests of precision and

> clarity, will formulate arguments which refer solely to issue or claim preclusion and which refrain from using the predecessors of those terms, whose meanings have become so convoluted.

*Barnes v. McDowell,* 848 F.2d 725, 728 n.5 (6th Cir. 1988).

The hope we expressed in *Barnes* was not realized in the arguments of the present parties, nor in the decision of the district court. We can only express the hope again.

*1. Issue Preclusion*

In Tennessee,

> Collateral estoppel operates to bar a second suit between the same parties and their privies on a different cause of action only as to issues which were actually litigated and determined in the former suit. To sustain a plea of collateral estoppel it must be shown, inter alia, that the issue sought to be concluded not only was litigated in the prior suit but was *necessary to the judgment* in that suit.
> 22 Tenn. Jurisprudence, pp. 111-12.

*Massengill v. Scott,* 738 S.W.2d 629, 632 (Tenn. 1987) (emphasis added).

The chancery court recited the university's allegation of plagiarism, and noted with a tone of skepticism that Heyliger contested the allegations, but did not explicitly make a finding on that issue. Nor did the chancellor hold that ETSU

did not renew Heyliger's contract in retaliation for criticizing its recruiting practices. The chancellor simply held that, by alleging retaliation, Heyliger did not state a cause of action under § 4-21-401(a) of the Tennessee Code. The chancellor granted the defendants' motion for summary judgment.

The Tennessee Court of Appeals affirmed the decision of the chancery court. Unlike the trial court, the court of appeals considered the possible application of § 4-21-301 (which does bar retaliation), but held that Heyliger had failed to state a claim under that section, because he had sued the individual defendants only in their official capacities, whereas the statute allows a suit for retaliation to be brought only against persons in their individual capacities. As for the § 401 claim, the court of appeals affirmed, stating:

> The chancellor reasoned that the plaintiff could not proceed with his claim of retaliation under § 4-21-401 (a) because the statute offers no protection against termination for protesting actions perceived as discriminatory towards unspecified individuals as a class.
> We agree. The statute proscribes the failure to hire because of race...or national origin; it provides a claim only for discrimination against the employee. It does not provide a basis of relief for one who unsuccessfully protests alleged discrimination against unnamed persons.

The court went on to state that:

> there is no factual dispute respecting one of the reasons given for the non-renewal of the plaintiffs

> contract.
>
> Plagiarism.
>
> Under oath, the plaintiff admitted that he copied substantial portions of a report .... We think that this admitted fact, standing alone, justified the refusal of the University to renew the plaintiffs contract.

It does not matter at all for our purposes that Heyliger had, in fact, disputed in detail the allegation of plagiarism; that Smith conceded in a deposition that Heyliger, in the private consulting report alleged to be plagiaristic, acknowledged the source on which he drew; that the University did not follow its normal procedures for investigating such a charge; in short, it is not important here that there existed, it appears to us, "a genuine issue as to a material fact" regarding the plagiarism allegation sufficient to defeat a motion for summary judgment under TENN. R. CIV. PROC. 56.03. So long as a state proceeding meets minimal standards of due process, *see Kremer* at 482-83, even an obviously erroneous judgment, as this one may have been, will have preclusive effect. *See Allen,* 449 U.S. at 101; *Osborn v. Ashland County Bd. Of Alcohol, Drug Addiction, and Mental Health Servs.,* 979 F.2d 1131, 1134 (6th Cir. 1992).

What *is* significant is that the issue of plagiarism was not "necessary to the judgment" in the state lawsuit, as required for issue preclusion under the law of Tennessee. *See Dickerson v. Godfrey,* 825 S.W.2d 692, 695 (Tenn. 1992). ("The doctrine does not apply unless the determination of the issue in the prior suit was necessary to the decision."); *Massengill,* 738 S.W.2d at 632; *cf. Barnes,* 848 F.2d at 730-31 (under Kentucky law, issue preclusion does not bar matters that were immaterial or unessential to determination

of the prior action). The rule, apparently consistent with that applicable in Tennessee, is set forth as follows in the RESTATEMENT (SECOND) OF JUDGMENTS § 27: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." As the commentary to that rule explains,

> [i]f issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.

*Id.*, comment h.

The holding by the Tennessee court of appeals that Heyliger could not state a claim under the Human Rights Act was enough to dispose of Heyliger's case. Thus, the additional holding, that Heyliger's copying of another consultant's report justified the non-renewal of his contract, was, so far as preclusion goes, merely *obiter dictum,* and the court of appeals's determination of plagiarism cannot be regarded as a settled issue that would, by providing a

legitimate, non-discriminatory reason for Heyliger's dismissal, defeat his Title VII claim.

2. *Claim Preclusion*

This court observed in *Whitfield v. City of Knoxville*, 756 F.2d *455*, 459-60 (6th Cir. 1985) that:

> [t]he Tennessee courts have held that if a second lawsuit involves the same parties acting in the same capacities and touches the same subject matter as the first lawsuit, then the principles of res judicata apply. *National Cordova Corp. v. City of Memphis*, 214 Tenn. 371,380 S.W.2d 793,798 (1964); *Grange Mutual Casualty Co. v. Walker*, 652 S.W.2d 908, 909-10 (Tenn. App. 1983) ....Thus, the doctrine of res judicata bars consideration of all claims that were or reasonably could have been litigated ... in the state court action. *American National Bank & Trust Co. v. Clark*, 586 S.W.2d 825, 826 (Tenn. 1979); *National Cordova Corp.*, 380 S.W.2d at 798; *Gibson Lumber Co. v. Neely Coble Co., Inc.*, 651 S.W.2d 232, 234 (Tenn. App. 1983).

In other words, Tennessee does not allow a plaintiff to split a cause of action, in agreement with the rule also set forth in the RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) as follows:

> When a valid and final judgment rendered in an action extinguishes the plaintiffs claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim

> extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Heyliger's lawsuits under the Tennessee Human Rights Act and Title VII certainly arose out of the same transaction. And the decisions of the Tennessee courts resulted in a valid and final judgment on the merits of the state-law claims.

Heyliger argues that this aspect of claim preclusion does not bar him from bringing a subsequent action, because two obstacles kept him from bringing his Title VII suit in state court. First, he avers that federal courts have exclusive jurisdiction over Title VII claims; but this ignores the Supreme Court's determination, in *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990), that state courts have concurrent jurisdiction over Title VII claims,[1] Heyliger's theory of exclusive federal jurisdiction (shared, prior to *Donnelly*, by the EEOC and the Third, Ninth, Tenth, and Eleventh Circuits, *id.* at 822 n.2) offers his federal lawsuit no protection against the rule found in RESTATEMENT (SECOND) OF JUDGMENTS § 25,

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[1] It was suggested at oral argument that Tennessee courts will not entertain claims brought under Title VII. We have found no authority for this proposition, and *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26 (Tenn. 1996), in which the plaintiff brought claims in chancery court under both the Tennessee Human Rights Act and Title VII, furnishes an example to the contrary. We note that the Tennessee Supreme Court has held that the courts of that state have jurisdiction to entertain suits brought under 42 U.S.C. § 1983. *See Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1986).

Comment e:

> When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground.

A bit more promisingly, Heyliger also argues that he could not, in any event, have filed a Title VII action until he received a right-to-sue letter from the EEOC, at which point the chancery court had already issued its judgment. As support for this theory, Heyliger relies on *Whitfield,* in which this court addressed similar, but not identical, circumstances. There, plaintiff Paris D. Goin filed an age-discrimination complaint under state law in Tennessee chancery court on December 23, 1982. The court entered final judgment against the plaintiff on February 8, 1983, only about forty-five days later. Goin then filed an ADEA complaint with the EEOC, and subsequently brought suit in district court. Defendants asserted res judicata. This court stated:

> In order to determine whether Goin could have raised the federal claim in the Knox County Chancery Court action, we first examine the language of ADEA. Title 29 U.S.C. § 626(d) provides that a private plaintiff such as Goin may not commence a § 626 age discrimination action until sixty days after the plaintiff has filed a charge with the EEOC. Moreover, where a state agency exists that may grant or seek relief from

> discriminatory practices, a private plaintiff may not commence a § 626 age discrimination action until sixty days after state administrative proceedings have commenced. 29 U.S.C. § 633(b); *Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 753-58, 99 S. Ct. 2066, 2070-72, 60 L. Ed.2d 609 (1979). Tennessee has created such an agency. *See* Tenn. Code Ann. §§ 4-21-103 & 4-21-104. Although a plaintiff need not wait longer than sixty days for a state agency to act, *Evans,* 441 U.S. at 761, a plaintiff must commence state proceedings and wait sixty days before filing an ADEA action.
>
> In the present case, Mayor Tyree ordered Goin's involuntary retirement on December 16, 1982. The Chancery Court entered final judgment in favor of the City on February 8, 1983. Had Goin filed a charge with the EEOC and commenced state administrative proceedings on the same day that the Mayor ordered his involuntary retirement, sixty days still would not have elapsed before the Chancery Court entered final judgment. Thus, even had Goin wished to assert the ADEA claim during the pendency of the Chancery Court action, he could not have done so because of 29 U.S.C. § 626(d) and § 633(b). Since the ADEA claim could not have been raised in the Chancery Court action under the facts of this case, Goin's federal claim is not barred by principles of res judicata.

756 F.2d at 460.

However, the court stated in a footnote:

> We do not address the question of whether Goin would have been required to amend his state court complaint in order to assert the ADEA claim had the Chancery Court action remained pending for more than sixty days after timely filing of charges with the EEOC and timely commencement of state administrative proceedings.

*Ibid* n.7.

Here, the significant date was 180 days after the date on which Heyliger filed his complaint with the EEOC, at which point Heyliger could have requested, and been entitled to receive from the Attorney General forthwith, a right-to-sue letter. *See* 42 U.§.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28(a)(1), (d)(2).[2] Unlike the sprinting chancery court in

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[2] Tennessee is a "State... which has a State... law prohibiting the unlawful employment practice alleged," *see* 42 U.S.C. § 2000e-5(c), and the Tennessee Commission for Human Development is a designated Fair Employment Practices agency, *see* 29 C.F.R. § 1601.74. The record does not show whether Heyliger filed a complaint with the TCHD before filing his complaint with the EEOC. If he filed a complaint with the TCHD at least sixty days prior to filing his EEOC complaint, then he would have been entitled to receive a right-to-sue letter 180 days after filing his EEOC complaint. If he did not file with the TCHD, the EEOC presumably would have filed a complaint with the state agency on his behalf, and waited sixty days before accepting jurisdiction. *See Love v. Pullman*, 477 U.S. 807 (1980). He would have been entitled to receive the right-to-sue letter 180 days after that. Because of the three-year pendency of his case in chancery court, the possible difference of sixty days is immaterial.

*Whitfield,* here the chancery court did not issue its judgment for almost three years, allowing far more time than necessary for Heyliger to obtain a fight-to-sue letter before a judgment of the state court issued. Once that notice was in hand, Heyliger could have folded his Title VII claim into his action in state court, for, under Tennessee law, "leave [to amend pleadings] shall be freely given when justice so requires." TENN. R. CIV. PROC. 15.0 (Michie 1996); *see, e.g., Blocker v. Dearborn & Ewing,* 851 S.W.2d 825 (Tenn. Ct. App. 1992); *Huntington Nat 'l Bank v. Hooker,* 840 S.W.2d 916 (Tenn. Ct. App. 1991); *see also Hunter v. Sevier,* 15 Tenn. 127 (1834); *cf* FED R. CIV. PROC. 15(a) (employing language adopted in parallel Tennessee rule).

Assuming that the EEOC and the Tennessee courts, if presented with a request and a motion, would have observed these rules, Heyliger's Title VII claim "reasonably could have been litigated.., in state court," *Whitfield* at 459. Heyliger therefore had an obligation to do so. Tennessee law has imposed on litigants a standard of due or reasonable diligence, *See Hayes v. Civil Serv. Corem'n,* 908 S.W.2d 826, 828 (Tenn. Ct. App. 1995) ("estoppel of the former judgment is conclusive, not only as to matters actually put in issue, but equally as to those which by due diligence of the litigant... might have been put in issue and determined") (quoting *National Cordova Corp.,* 380 S.W.2d at 796). Requiring a plaintiff in Heyliger's shoes to seek a right-to-sue letter and to amend his complaint does not exceed the burden of a due diligence standard. *Cf. Herrmann v. Cencom Cable Assoc., Inc.,* 999 F.2d 223, 225-26 (7th Cir. 1993) (requiring claimant, in order to avoid claim preclusion, to seek a right-to-sue letter and join Title VII claim with another, sufficiently related, pending federal action, even though to do so could

pretermit EEOC administrative proceedings); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 40 (2d Cir. 1992) (Title VII action precluded where plaintiff' could have sought a right-to-sue letter and amended complaint in pre-existing federal lawsuit to include Title VII claim). Not requiring Title VII plaintiffs to comply with this requirement would mean, as Judge Posner observed in *Herrmann*, that "a significant fraction of legally questionable discharges would give rise to two suits," a result that would be "inefficient and.., unduly burdensome to employers and hence indirectly to other workers and to consumers as well as to stockholders . . ." 999 F.2d at 225.

We hold, therefore, that under Tennessee's law of claim preclusion, the prior adjudication in state court barred Heyliger's action in federal court. Whether the reasoning behind our holding should apply to state suits brought elsewhere in this circuit will depend, under *Kremer*, on the law of claim preclusion in the particular state.

## III

For the foregoing reasons, we AFFIRM the judgment of the district court.

## APPENDIX B

WILTON E. HEYLIGER, )
Plaintiff, )
) No. 3:94-0321
v. ) Judge Echols
)
STATE UNIVERSITY AND )
COMMUNITY COLLEGE )
SYSTEM OF TENNESSEE, )
et al., )
Defendants. )
_____ /

### AFFIDAVIT OF WILTON E. HEYLIGER

I am Wilton E. Heyliger, plaintiff in this action. I have personal knowledge of the matters hereinafter specified, am competent to testify as to them, and would do so in open court if called upon. The following is affirmed by me as true and correct under penalty of perjury and all facts stated below were presented to the court in my state suit under the Tennessee Human Rights Act:

I am a black male born in Demerara, British Guiana, now called Guyana.

I came to the United States in 1967 to attend Howard University, and became an American citizen in 1986. I obtained an undergraduate degree from Howard University, a Master's degree in business from Southern Illinois University in 1977, and a Ph.D. in economics from Indiana University in 1981.

Since obtaining my Ph.D., I have held positions as

Assistant Professor at Howard University and Virginia State University, as Visiting Professor at William and Mary College, and as Associate Professor and Chairman of the Department of Finance and Marketing at Norfolk State University.

In 1988, I was completing the assignment as Associate Professor at Virginia State University, and had discussions with Allen Spritzer, Dean of the College of Business at East Tennessee State University regarding employment at E.T.S.U. The two of us negotiated and agreed I would come to E.T.S.U. beginning the 1988-1989 school year as an Associate Professor of Finance in the Economics and Finance Department of the College of Business, for a salary, certain money benefits under the fund required by Geier v. Alexander, 593 F.Supp. 1263 (M.D. Tenn. 1984), one year's credit toward tenure, and two years' credit toward promotion to full professor.

I was the only black tenure track faculty member in the College of Business during the time I was employed at E.T.S.U.

In the 1988-1989 school year, I received a performance rating of "commendable," delivered four presentations of research findings, had three papers accepted for publication, and obtained a TVA research grant.

Also during the 1988-1989 school year, I was appointed by the President of E.T.S.U. to a bi-racial committee with responsibility for evaluating the racial climate on campus. I was also appointed by Spritzer to a search committee for the purpose of recommending a Chairman for the Economics and Finance Department.

Over my objection, the search committee established qualifications for candidates which would have the effect of

discouraging minority persons and persons between the age 40-70 from applying for the position. Some members of the search committee questioned the need for any additional minority faculty at E.T.S.U., some stated a minority applicant would not be approved by Spritzer, and others stated a candidate should not come to E.T.S.U. and retire after only a few years of work.

The search committee narrowed down candidates to two individuals, one of whom was of origin from India and the other of whom was white. Both of these candidates were superbly qualified, although the white candidate lacked some administrative experience. Instead of recommending the Indian as candidate for the position of chairman, the committee determined to report to Spritzer that it could not nominate anyone from the candidates considered. I dissented from this decision.

Another faculty member, Jon Smith, served on the committee at this time. After the report to Spritzer, Smith resigned from the committee and personally applied for the position of chair himself, and he was selected by Spritzer although he did not meet the criteria and qualifications which had been used by the committee to solicit candidates from outside E.T.S.U.

I had personally protested some of the conduct of the search committee during committee meetings, and also directly to Spritzer. When Smith was selected as chair, I again protested to Spritzer and then to Smith about what I perceived as a selection process which eliminated minority candidates who were as qualified as Smith; also to Wilsey Bishop, an Associate Vice President at E.T.S.U., and to General Neasman who is the Director of Human Resources and the coordinator responsible for compliance with terms of

the Geier settlement in which E.T.S.U. had agreed to hire minorities.

Immediately after my protest to Spritzer and Smith about the selection of Smith, they entirely changed their treatment of me as a faculty member. Their actions thereafter included the following: threats to do me in at tenure time; making racial comments that as a black person, all I wanted to do was "bullshit" my way to success; assigning me to work a schedule which would have resulted in lost income, then changing the assignment; refusing to me department resources which were made available to other faculty members; refusing to support my research efforts without direct supervision by Smith, which supervision was not required of any other faculty members; writing memoranda and notes which were not true and were designed to tarnish my record; withdrawing an offer to my wife to teach summer school, and then reinstating the offer; assigning my wife to a school work schedule which left insufficient time for her to take tutorial work at the University of Tennessee with Geier fund allocations; berating me for complaining about the treatment of my wife; publicly calling me a "liar" and "asshole." Further, since January of 1990, Smith refused to speak to me in the presence of students or other faculty members, and this caused humiliation to me and fostered contempt for me by some students.

In February of 1990, Smith wrote a memo to Spritzer suggesting that a review process be initiated to evaluate my performance. No such memorandums were written concerning white faculty members. A graduate student working for Smith solicited other graduate students to report any possible problems with me, although other white faculty members were not treated in this manner.

Both Spritzer and Smith had confirmed I had a high level of productivity as a faculty member in January of 1990, but a few months later, Spritzer indicated my employment contract would not be renewed at the end of the 1990-1991 school year.

E.T.S.U. has a formal policy of giving the reasons for nonrenewal of the contract for nontenured faculty. Spritzer was designated to fulfill this function for E.T.S.U. Spritzer advised me that the reasons for nonrenewal were due to my performance in teaching and research; he did not give as a reason a charge of plagiarism which had been initiated against me by Smith. Rather, Spritzer stated discussions were taking place with regard to whether termination for cause proceedings should be initiated as a result of a concern of plagiarism which had been raised by Smith. Spritzer has confirmed that at the time of this meeting with me, no decision aboút the occurrence of plagiarism had been made. He also told me that his decision would not change even if plagiarism was not proven by Smith.

At the time Spritzer advised me of the reasons for nonrenewal, my performance in teaching and research was comparable to some white faculty members and superior to that of other white faculty members.

The plagiarism issue arose in connection with a working draft of a study concerning the Elizabethton, Tennessee airport which had been prepared by me. I prepared this preliminary draft about the Elizabethton airport as a favor to my neighbor, who gave me information he obtained from a workshop sponsored in part by the Aircraft Owners and Pilots Association and which included a presentation on how to do your own municipal airport economic impact study.

My neighbor was Mr. Reid Berry who operates the

Elizabethton airport which is largely funded by Moody Aviation, a Division of the Moody Bible Institute. I told my neighbor I would do the study without charge or cost as a community service, but my motivation was, however, deeper. I knew that the study would help the Moody Bible Institute, and I am personally committed to the evangelical and spiritual ministry of such organizations. My family has been connected with church work for more than 100 years. I was born of missionary parents in Guyana.

Mr. Berry gave me a large file which included a report by a firm called Hammer, Siller and George on the DeKalb Peachtree Airport. He stated he would appreciate it if I could just fill in the numbers and adjust any conclusions to reflect current and relevant information about the Elizabethton Airport; he stated the workshop sponsors encouraged participants in the workshop he attended to use the DeKalb Peachtree study as a guide for their own airports.

I prepared a survey and interview instruments with the help of Mr. Berry and distributed them to relevant persons. I collected data and read the latest information on the economic viability of municipal aviation airports. My graduate assistants helped in the various stages of data collection and analysis. The model used in the DeKalb Peachtree Airport Study for analysis of similar data is a well-known economic model which is a variant of the simple Keynesian multiplier model taught in high schools and in the freshman year at E.T.S.U. My study adopted the same model.

After completion of the data analysis, I conducted an independent evaluation and reached conclusions which were similar to those of the DeKalb Peachtree Airport study except for the magnitude of the numbers. At this stage, the study

was sent to Mr. Berry for comment. Apparently, Mr. Berry gave it to Mr. Hord who was the city manager for Elizabethton, Tennessee, and the draft report became public.

When I found out the study was public knowledge, I told Dr. Hipple who is the Director of the E.T.S.U. Bureau for Business and Economic Research, to put in the draft study as a working paper in the Bureau. My intention was to let interested colleagues in the department see what kind of work I was doing before they read about it in the newspaper.

This working paper series is like the working paper series at most universities in that it is no intended to be finished or final work with the result that papers given to the Bureau are usually not offered for publication. Such papers normally contain a "not to be quoted" clause, and they are posted without references in an indication of their unfinished status.

Apparently, the report was then furnished to Smith. After Smith obtained a copy of the draft, he contacted Cutler, Hammer & Associates and asked them to write him a letter indicating my work was a copy of theirs. They did so, and Smith began claiming I had plagiarized.

The DeKalb Peachtree Airport Study was a work for hire which had been ordered by the consulting firm called Cutler, Hammer & Associates. Due to the statements to me from my neighbor, I used prose from the Peachtree DeKalb Airport Study in the draft of the report concerning the Elizabethton Airport; much of the prose was not unique or original.

It is not uncommon for economists to use prose of other economists without attribution, so long as the basic empirical data used in connection with the prose is a product of independent and personalized research. In the draft of the

Elizabethton Airport Study, I made a footnote reference to the prior study by Cutler, Hammer & Associates for the DeKalb Peachtree Airport authority, even though that study was a work for hire without any copyright or ownership interest belonging to Cutler, Hammer as it belonged to the airport authority which had encouraged participants at the workshop to use it as a model. I am advised the Aircraft Owners and Pilots Association partially paid for the study, and does not consider the study as proprietary, and encourages its use freely and completely by anyone.

I state unequivocally that my work for the Elizabethton Airport was not plagiarized and could not have been plagiarized due to the fact that the reports were about two dissimilar airports with dissimilar empirical data in each.

E.T.S.U. has a formalized procedure for resolving claims about plagiarism which involves consideration by other faculty members of such claims. I requested on numerous occasions that Smith or Spritzer initiate the procedure, but they did not.

After the claim of Smith about plagiarism arose, I spoke with and wrote to Dr. Robert Alfonzo who is the principal person in charge of faculty matters at E.T.S.U. to request that there either be a formalization of charges against me with an opportunity to rebut them, or a decision that no charge of plagiarism would be brought. Dr. Alfonzo subsequently wrote to me to say that no charge of plagiarism under the E.T.S.U. system would be initiated. As a result, a conclusion was never reached at E.T.S.U. under the formal procedure for considering charges of plagiarism, and according to Spritzer a conclusion was never reached by him and it is he who made the decision not to renew my contract.

To my knowledge, no white faculty member at

E.T.S.U. has ever been treated in this manner when plagiarism charges arose.

After leaving E.T.S.U., I have taught at Morris Brown College in Atlanta and am an adjunct professor at Clark-Atlanta University. I have been awarded a Nissan fellowship, am a visiting professor for the Federal Reserve Bank, and have had numerous publications in such journals as the Business and Economic Review.

I did not receive a right to sue notice from the EEOC until well after the trial court in Davidson County dismissed my case.

I am willing and eager to present further and finite details of all of the foregoing which I contend to be a violation of my rights under Title VII of the Civil Rights Act of 1964.

Respectfully submitted,

/s/_____
WILTON E. HEYLIGER

/s/_____
Phyllis Jones
Notary Public, Fulton County, Georgia
Commission Expires June 30, 1995

The undersigned hereby certifies that the foregoing has been served via United States First Class Mail with adequate postage affixed thereon to the following:

Charles W. Burson
Attorney General and Reporter
S. Elizabeth Martin, No. 013329
Civil Litigation and State Services Division
450 James Robertson Parkway
Nashville, TN 37243-0490

This 4th day of May, 1995.

/s/_____
R. Jan Jennings

## APPENDIX C

No. 90-3826-II

**IN THE CHANCERY COURT
FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT,
DAVIDSON COUNTY, PART II**

FILED
November 19, 1993

| | | |
|---|---|---|
| WILTON HEYLIGER | ) | |
| | ) | |
| v. | ) | |
| | ) | **MEMORANDUM** |
| | ) | **AND ORDER** |
| STATE UNIVERSITY AND | ) | |
| COMMUNITY COLLEGE | ) | |
| SYSTEM OF TENNESSEE, | ) | |
| ALLEN SPRITZER AND | ) | |
| JON SMITH | ) | |
| | / | |

This is an action for wrongful discharge under the Tennessee Human Rights Act, T.C.A. § 4-21-101 et seq. Before the Court is the defendants' Motion for Summary Judgment.

On July 8, 1988, the plaintiff and the State University and Community College System of Tennessee entered into an agreement styled "NOTICE OF TENURE-TRACK APPOINTMENT AND AGREEMENT OF EMPLOYMENT

FOR FACULTY". This agreement had an effective commencement date of August 16, 1988 and included the following pertinent language:

> "This appointment is a tenure-track appointment, which is for faculty employed in a probationary period of employment .....This appointment is on an annual basis only, subject to renewal by this institution, and annual approval by this institution, ... for a maximum probationary period of seven years."

In other words, the maximum probationary period extended to August 16, 1995.

The plaintiff alleges that the discriminatory and retaliatory practices began in July 1989, immediately following his "protest" of the selection of the defendant Spritzer as Chairmen of defendants' department "based upon what I perceived as a discriminatory procedure which had excluded minority and older candidates." However, the defendant was told in May, 1990 that his contract would not be renewed in July, 1991, after the University received a letter from Hammer-Siler-George Associates, an economic and development consulting firm, accusing the plaintiff of copying verbatim one of their reports and demanding an apology from the University. In other words, the defendant's employment did not cease until two years after the alleged retaliation commenced and one year after he was given notice that his contract would not be renewed. The defendants cite several other reasons for not renewing the plaintiff's contract, including unprofessional conduct, poor teaching evaluations, student and faculty complaints concerning sexual harassment by the plaintiff and poor research skills.

On November 5, 1993, the plaintiff filed an affidavit in response to this motion in which he recites facts that he claims creates an issue of fact whether the reasons offered by the defendants for not renewing his contract are pretextual. In essence, this affidavit goes to rebutting the defendants' stated non-discriminatory reasons for not renewing the plaintiff's contract. It does not directly add to the plaintiff's claim.

T.C.A. § 4-21-401(a)(1) describes the prohibited activity in pertinent part as follows: "It is a discriminatory practice for an employer to: Fail or refuse to hire or discharge any person...or otherwise to discriminate against an individual because of such individual's race...or national origin;" (Emphasis added) It offers no protection for termination because he protested against what he perceived as a discriminatory practice against unspecified individuals as a class.

Having considered the entire record in this case, including all the affidavits filed on behalf of the parties, the briefs filed in favor and opposition to this motion and the U.S. Supreme Court's pronouncements in St. Mary's Honor Center v. Hicks, 61 U.S.L.W. 4782 (1993), the Court is of the opinion that this motion is well taken and it is hereby, GRANTED. IT IS SO ORDERED.

Costs are taxed to the plaintiff.

/s/_____
C. ALLEN HIGH, CHANCELLOR

cc: Jane W. Young
R. Jan Jennings

## APPENDIX D

## IN THE COURT OF APPEALS OF TENNESSEE
## MIDDLE SECTION

FILED
July 27, 1994
CROWSON, CLERK

| | | |
|---|---|---|
| WILTON E. HEYLIGER,<br>Plaintiff-Appellant | ) | NASHVILLE<br>CHANCERY |
| v. | ) | 01-A-01-9402-<br>CH-00058 |
| STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF TENNESSEE, ALLEN SPRITZER, and JON SMITH,<br>Defendants-Appellees. | ) | AFFIRMED. |

BRANSTETTER, KILGORE, BRANCH & JENNINGS, Nashville, for the Appellant.

CHARLES W. BURSON, Attorney General;
S. ELIZABETH MARTIN, Assistant Attorney General, Nashville, for the Appellees.

## OPINION

Inman, Senior Judge

This is an action under the Human Rights Act, Tenn. Code Ann. S4-21-101, *et seq*. The plaintiff seeks reinstatement, damages and injunctive relief. He is a black, male American who migrated to the United States from Guyana in 1967 to attend Howard University. After earning graduate degrees in business and economics, he became a naturalized citizen in 1986. The motion of the defendants for summary judgment was granted, the propriety of which is presented for review.

A contract of employment between the plaintiff and East Tennessee State University appointed him Associate Professor of Finance, effective August 16, 1988 for the 1988-89 academic year.

The plaintiff served on a search committee which was convened to select a permanent Chair of the Department of Economics and Finance. The defendant, Smith, was a member of the committee, from which he resigned so that he might apply for the position. He was thereafter appointed Chair, and in early 1990, recommended against the renewal of the plaintiff's contract because of his unprofessional conduct and substandard performance of his duties. According to Smith, his recommendation against renewal was based specifically on: (1) the plaintiff's poor teaching evaluations; (2) student comments about the plaintiff's unacceptable behavior and arbitrary grading procedures; (3) complaints of sexual harassment; (4) plagiarism; (5) the plaintiff's abusive behavior towards secretaries; and (6) his poor research skills.

The plaintiff was not re-hired after the first probationary year, and filed this action alleging that the search committee's actions were discriminatory in that the established qualifications for the Chairmanship had the effect of discouraging minority persons and persons over 40 from applying for the position. He alleges that Smith commended a series of retaliatory and discriminatory actions against him with the knowledge and approval of the defendant, Spritzer, Dean of the College of Business. The statements attributed to Smith, "Why do we need any more minorities, what would they do in Johnson City, we don't seem to have enough cultural things," are alleged to be racially biased.

Dean Spritzer concurred in Chairman Smith's recommendation that the plaintiff's contract should not be renewed. He based his concurrence upon his overall assessment of the plaintiff's job performance and a number of other factors including allegations by students: (1) of sexual harassment, (2) of being unable to work problems in class, and (3) the accusation that the plaintiff had plagiarized a report on the economic impact of a regional airport.

The Human Rights Act, as pertinent to this case, provides:

4-21-301. Discriminatory practices. It is a discriminatory practice for a person or for two or more persons to

(1) retaliate or discriminate in any manner against a person because such person has opposed a practice declared discriminatory by this Chapter ...

4-21-401. Employer practices. (a) It is a discriminatory practice for an employer to

(1) fail or refuse to hire or discharge any person or otherwise to discriminate against an individual with

respect to compensation, terms or conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age, or national origin, or

(2) Limit, segregate, or classify an employee or applicant for employment in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee because of race, creed, color, religion, sex, age or national origin..."

The plaintiff argues that he has a cause of action for retaliation under section 301(1) and refers us to the plain language of the statute. The defendants respond that this suit is against the Board of Regents, Community College System and Smith and Spritzer, who are sued in their official capacities; hence that this suit is not against an individual as only allowed by section 301. *Cox v. State*, 399 S.W.2d 776 (Tenn. 1965). We agree. It is a 'person or persons' whose actions are addressed in this section; nowhere therein is the State declared to be a person. The language should be strictly construed because the State's immunity may be abrogated only as the Legislature directs. To extend the meaning of the word 'person' in the context of this case, to include the State would impermissibly enlarge the abrogation of sovereign immunity. See *Norman v. State Board of Claims*, 533 S.W.2d 719 (Tenn. 1975); *Sweeney v. State*, 744 S.W.2d 905 (Tenn. Ct. App. 1987); *State ex rel Allen v. Cook*, 106 S.W.2d 858 (Tenn. 1937). We agree with the argument of the State that the Legislature did not intend to waive sovereign immunity on any Human Rights claim except those involving employment under Tenn. Code Ann. § 4-21-401.

Turning now to the Section 401 claim, the affidavit of the plaintiff in opposition to the motion for summary

judgment asserts facts which are offered in rebuttal to the defendants' stated non-discriminatory reasons for refusing to renew the employment contract. He argues that an issue is thereby created as to whether such reasons are pretextual.

The chancellor reasoned that the plaintiff could not proceed with his claim of retaliation under § 4-21-401(a)(1) because the statute offers no protection against termination for protesting actions perceived as discriminatory towards unspecified individuals as a class. We agree. The statute proscribes the failure to hire because of race...or national origin; it provides a claim only for discrimination against the employee. It does not provide a basis of relief for one who unsuccessfully protests alleged discrimination against unnamed persons. We are not referred to any authority, and know of none, which supports the plaintiff's theory.

In *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993), we are instructed with respect to Rule 56 Motions that an evaluation of a motion for summary judgment requires determination of whether a factual dispute exists, whether the disputed fact is material, and whether it creates a genuine issue.

And there is no factual dispute respecting one of the reasons given for the non-renewal of the plaintiff's contract.

Plagiarism.

Under oath, the plaintiff admitted that he copied substantial portions of a report prepared by Hammer, Siler, George Associates; Atlanta, Georgia, for the Atlanta Chamber of Commerce, dealing with the economic impact of a regional airport, into a study he prepared for the City of Elizabethton in March, 1990. He seeks to excuse this action because he only "used the prose," and otherwise tended to treat the matter cavalierly. We think that this admitted fact, standing alone, justified the refusal of the University to renew the

plaintiff's contract. Significantly, the plaintiff was informed in may, 1990, that his contract would not be renewed in July, 1991, after the University received a letter from the Hammer firm demanding an apology.

Moreover, and keeping in mind that the plaintiff had no vested contractual or legal right to the position, since he was appointed for only one academic year, the University might have declined to renew the contract for any reason, absent those proscribed by the Act. The rebuttal, by affidavit, of the alleged acts of sexual harassment, or poor teaching or research skills, or abuse of secretaries, and the like, is unavailing, since the contract provides:

"This contract is a tenure-track appointment, which is for faculty employed in a probationary period of employment. A tenure-track appointment does not include any right to permanent or continuous employment or any interest in or expectancy of renewal of the appointment."

The judgment is affirmed and the costs are taxed to the appellant.

/s/_____
William H. Inman, Senior Judge

CONCUR:

/s/_____
Henry F. Todd,
Presiding Judge

/s/_____
Samuel L. Lewis, Judge

## APPENDIX E

**Davidson Equity**
**No. 01-A-01-9402-CH-00058**

**IN THE SUPREME COURT OF TENNESSEE**
**AT NASHVILLE**

FILED
January 30, 1995
CROWSON, CLERK

| | | |
|---|---|---|
| WILTON E. HEYLIGER,<br>Plaintiff-Appellant, | ) | |
| v. | ) | **ORDER** |
| STATE UNIVERSITY AND<br>COMMUNITY COLLEGE<br>SYSTEM OF TENNESSEE,<br>ET AL.,<br>Defendants-Appellees. | ) | |

The application for permission to appeal and the entire record in the above cause has been considered by the Court. It is the decision of the Court that the application should be denied. We concur in the decision of the Court of Appeals in result only.

PER CURIAM

## APPENDIX F

## FULL FAITH AND CREDIT ACT
## 28 U.S.C. § 1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(June 25, 1948, c. 646, 62 Stat. 947.)

## APPENDIX G

### 42 U.S.C. § 2000e-5(f)(1)

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person

aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections[2](c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.